similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;"

Hence unless it is established by evidence that there was a Bill of Lading or any similar document of title, insofar as such document relates to carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and holder of the same, the court is in no position to strike out the action.

For the reasons stated above the motion was dismissed with costs.

Motion dismissed.

Solicitors: *R. Rajasingam & Co.; Lim Kean Chye & Co.*

METAL INDUSTRY EMPLOYEES UNION v. REGISTRAR OF TRADE UNIONS, MALAYSIA

[O.C.J. (Hashim Yeop A. Sani J.) August 20, 1981]
[Kuala Lumpur — Originating Motion No. 7 of 1979]

Trade Union — Order by Registrar removing names of members of union — Non-compliance with rules of natural justice — Trade Union Ordinance 1959, s. 26(3).

Administrative law — Trade Union — Cessation of membership order by Registrar — Non-compliance with rules of natural justice — Order quashed.

The union sought that the order made by the Registrar of Trade Unions, Malaysia, contained in his letter of August 4, 1978 be quashed. The said Order sought to be quashed was that the names of 61 members of the union be removed forthwith from the register of the union because of their purported involvement with certain illegal industrial actions. The order of the Registrar was purported to be made under section 26(3) of the Trade Unions Ordinance 1959.

Held, allowing the union's application: (1) it was not within the power of the Registrar to order cessation of membership of any member of a trade union. Cessation of membership under that sub-section operated consequent upon the happening of a certain event described in paragraph 12 of the First Schedule to the Ordinance;

(2) the Registrar had no power on his own motion to remove the members from the register of the union where it has not been shown conclusively that these members had taken industrial action in contravention of the Ordinance and rules of the union;

(3) the Registrar had in this case arrived at his finding without due and proper enquiry and therefore the decision was invalid as infringing the principles of natural justice.

Cases referred to:-

(1) *Board of Education* v. *Rice* [1911] A.C. 179.
(2) *M. Appukutty* v. *Sales Tax Officer* A.I.R. 1966 Kerala 55.
(3) *Healey* v. *Minister of Health* [1955] 1 Q.B. 221 @ 227.

ORIGINATING MOTION.

D.P. Xavier (*K.P. Gengadharan* with him) for the applicants.

Miss Susila Param (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: In this notice of motion the Metal Industry Employees Union is asking that the order made by the Registrar of Trade Unions, Malaysia, contained in his letter dated August 4, 1978, (Exhibit MIEU 6) be quashed. The order sought to be quashed was that the names of 61 members of the union be removed forthwith from the register of the union because of their purported involvement with certain illegal industrial actions. The order of the Registrar was purported to be made under section 26(3) of the Trade Unions Ordinance, 1959 (hereinafter referred to as "the Ordinance").

The grounds given in the statement can simply be summarised as follows: —

(1) The Registrar had no power under section 26(3) of the Ordinance to order the removal of names of the members of the union from the register of the union; and

(2) Even if the Registrar had the power, the order was invalid because no proper enquiry was held by the Registrar and that the Registrar had violated the principles of natural justice and that the order was arbitrary and capricious.

For convenience section 26(3) of the Ordinance is reproduced below:

"Any group of employees being members of a trade union, who take any form of industrial action in contravention of this Ordinance or the rules of such union, shall cease to be members of the union and thereafter such members shall not be eligible from becoming members of a trade union unless approved by the Registrar."

This subsection was added to the Ordinance by Act A90 but was repealed by Act A483 with effect from May 30, 1980. Relevant for consideration along with section 26(3) is section 38(1) of the Ordinance and paragraph 12 of the First Schedule to the Ordinance. Section 38(1) provides that the rules of every registered trade union shall make provision for all matters as specified in the First Schedule. Paragraph 12 of the First Schedule to the Ordinance prescribes that one of the matters for which provision must be made in the rules of every registered trade union is the matters relating to cessation of membership if members take industrial action in contravention of any provision of the Ordinance or the rules of the union. Paragraph 12 was also repealed and substituted by Act A483 with effect from May 30, 1980.

It is not disputed that the rules of the applicant union during the material period contained the provisions in paragraph 12 to the First Schedule to the Ordinance.

Looking at these statutory provisions it will seem clear that the two basic issues are:

(1) whether the Registrar of Trade Unions, Malaysia has power under section 26(3) of the Ordinance to order removal of the names of those workers from the register of the union; and

(2) if the answer to the first is in the affirmative, whether the order he made was nevertheless invalid on the grounds alleged in the statement.

Before the Ordinance was amended by Act A483 the powers of the Registrar were given in section 3 of the Ordinance which provided that the Registrar

"shall be responsible for the due performance of the duties and functions assigned to the Registrar under this Ordinance." The key word in the section is "assigned" which means that under the section before the amendment the Registrar shall have such powers as were assigned, expressly or by implication, under the Ordinance. Looking at the wording of section 26(3) of the Ordinance it would seem to me that before the deletion by Act A483, that subsection provided as *a matter of law* that any group of employees, being members of a trade union who took part in an illegal industrial action, shall cease to be members of the union and shall not be eligible to become members again unless approved by the Registrar. In other words, it is clear from the wording of the provision that the only power assigned to the Registrar was to approve for membership those who had ceased to be members of a union. It was surely not within the power of the Registrar to order cessation of membership of any member of a trade union. Cessation of membership under that subsection operated consequent upon the happening of a certain event described in paragraph 12 of the First Schedule to the Ordinance.

It is pertinent to note that section 63(1) of the Ordinance provides, *inter alia,* for the general penalty in respect of every person and trade union who or which contravenes any rule of the union relating to any matter specified in the First Schedule to the Ordinance. In my view it is clear from the scheme of legislation that it is really for the trade union concerned to give effect to the provisions of section 26(3) of the Ordinance and paragraph 12 of the First Schedule to the Ordinance before the amendment by Act A483. Failure of the union to comply with these provisions could result in a prosecution under section 63 of the Ordinance.

Let us now come to the facts of this case. As admitted in the affidavit of the Registrar himself he received a letter from the company on June 8, 1978 complaining of alleged illegal industrial actions on May 29, 30 and 31, 1978 by certain members of the applicant union. In paragraph 4 of the said affidavit the Registrar admitted that "having examined carefully" the information contained in that letter it appeared to him that members of the applicant union had taken illegal industrial actions and requested the applicant union (in a letter dated June 9, 1978) to forward a list of members in the company and to show cause why they should not be removed from membership of the applicant union purporting to do so under section 26(3) of the Ordinance. Subsequently another letter was received by the Registrar from the same company giving further information of another industrial action on June 15, 1978 together with a list of 29 employees allegedly involved in the industrial action. Again on July 27, 1978 the Registrar received yet another letter from the company dated July 14, 1978 to which was attached a list of names of 55 employees allegedly involved in industrial actions on May 29, 30 and 31, 1978. In the meantime the Registrar also received letters from the applicant union. The first letter was on June 26, 1978 which denied that there was any unauthorised industrial action taking place by its members in the company. A second letter was received on July 19, 1978 which denied that its members had taken any unlawful industrial action on June 15, 1978.

It can be seen from the affidavits therefore that there were alleged illegal industrial actions occurring on four separate dates namely May 29, 30, 31 and June 15, 1978. It is also clear that there were two lists containing names of members alleged to be involved, supplied to the Registrar by the company, namely a list of names of 29 employees in respect of the alleged industrial action of June 15, 1978 and the list of names of 55 employees in respect of the alleged industrial action on May 29, 30 and 31, 1978. It is also clear that the applicant union denied that its members had taken any unlawful industrial action on June 15, 1978.

According to the Registrar in his affidavit he gave "full particulars" of the alleged industrial actions on those dates referred to to the applicant union and the reply given by the union (Exhibit MIEU 5) merely denied any industrial action, though admitting there was stoppage of work. On the strength of this the Registrar concluded in paragraph 11 of his affidavit that he had "given full opportunity" to the applicant union to rebut, reply and refute the allegations of the company. He also came to the conclusion that the 61 workers whose names had been submitted by the company had involved in industrial actions on the dates referred to in contravention of the rules and constitution of the applicant union. Accordingly he sent the letter dated August 4, 1978 directing the names of the 61 workers be removed from the register of the applicant union.

Looking at the affidavit of both the Registrar and that of the General Secretary of the applicant union I find it difficult to see how the Registrar could have come to a proper conclusion and a proper finding that the 61 workers were actually involved in the alleged illegal industrial actions on the various dates, without some form of enquiry since the applicant union had denied that its members took part in any form of industrial action at all. It is not disputed at all that the list of 61 names of the workers alleged to be involved were furnished to the applicant union for the first time together with the letter dated August 4, 1978 which is the subject of the present motion. It is also not disputed that the applicant union informed the Registrar that none of the members mentioned in the list had taken part in any of the alleged industrial actions and in any event 21 members out of the list of 61 members could not have been involved in any alleged industrial action because of the reason given in paragraph 7 of the affidavit of the General Secretary of the applicant union.

In my opinion the obvious conclusion one can draw from the background facts is that the Registrar had come to his finding without due or proper enquiry. If persons are to be deprived of any of their rights the rule of *audi alteram partem* must be strictly observed. I need only quote Lord Loreburn when he dealt with the powers of the Board of Education in *Board of Education* v. *Rice*[1] where he observed:

"In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen

to both sides, for that is a duty lying upon everyone who decides anything."

The company complained that so many workers were involved in the alleged illegal industrial actions whereas the union denied the allegation. The conflict could only be resolved by due and proper enquiry by the Registrar. Principles of natural justice demand that there should be fair determination of a question; and arbitrariness will certainly not ensure fairness. See also *M. Appukutty* v. *Sales Tax Officer.*[2]

Finally the Registrar would seem to me to have assumed jurisdiction in the mistaken belief that section 26(3) of the Ordinance gave him the power to order the removal of the names of the members. It is clear that such mistake or misuse of power goes to jurisdiction. In *Healey* v. *Minister of Health*[3] Lord Denning L.J. (as he then was) when referring to the sort of cases in which the court should intervene said:

"Suppose, he said, that a man had served more than 10 years and had reached the age of 60. Under regulation 7 he would be entitled to a pension. But suppose the Minister determined that he had no right to one. Would not the courts interfere? I think they would. There would in that case be good reason for thinking that the Minister had mistaken or misused his powers; and the court would on that ground declare his determination to be invalid, in much the same way as it can declare the decision of a valuer to be invalid; see *Dean* v. *Prince* [1954] Ch. 409; [1954] 1 All E.R. 749."

In conclusion, my answers to the questions posed are therefore as follows: —

(1) It is a matter of law where a member of a union ceases to be a member by virtue of paragraph 12 of the First Schedule to the Ordinance which cesser in any case must be preceded by the happening of the event described in the paragraph;

(2) The Registrar had no power on his own motion to remove the members from the register of the union where it has not been shown conclusively that those members had taken industrial action in contravention of the Ordinance and rules of the union.

(3) The Registrar had in this case arrived at his finding without due and proper enquiry and therefore the decision was invalid as infringing the principles of natural justice.

Application allowed.

Solicitors: *John R. Gurusamy & Gengadharan & Co.*